

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-4235

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE E. MORE and ADELA T. MORE,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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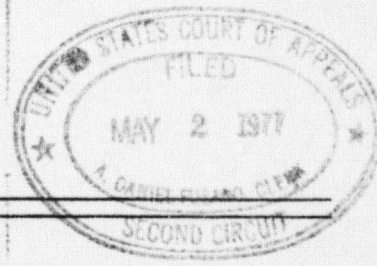


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STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court correctly concluded that taxpayer, who was a nonresident alien for the early portion of his 1960 taxable year, was ineligible to use the income averaging provisions of the statute in that his "base period" for purposes of Section 1303(b) of the Code included the entire calendar year 1960 and Section 1303(b) proscribes income averaging when a taxpayer was a nonresident alien for any portion of the "base period."

STATEMENT OF THE CASE

This appeal involves federal income taxes in the amount of \$93,676.87 for the taxable year 1964. (R. 25.) The findings of fact and opinion of the Tax Court which is reported at 66 T.C. 27 was filed on April 5, 1976. (R. 24.)^{1/} The decision of the Tax Court was entered on July 22, 1976. (R. 37.) Taxpayer's notice of appeal was filed on October 22, 1976.^{2/} (R. 38.) Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts pertinent to this appeal as found by the Tax Court, (R. 25-28) are as follows:

^{3/} Taxpayers, husband and wife, were Cuban residents on January 1, 1959. (R. 26.) Taxpayer held a Cuban passport issued on April 24, 1958, which contained a nonimmigrant visa issued by the American Embassy on October 8, 1958, "valid for unlimited applications for admission into the United States if presented before October 7, 1962." He was admitted to the United States and readmitted to Cuba on the following dates, remaining in the United States and Cuba during the intervening periods except as hereinafter noted (R. 26-27):

1/ "R". references are to the separately bound record appendix.

2/ The envelope which contained the notice of appeal was postmarked October 19, 1976, making the notice timely.

3/ The principal taxpayer in this litigation is Jose E. More. Adela T. More is joined as a party solely because she filed a joint return in 1964 with her husband, Jose. Hereinafter, the term "taxpayer" will refer to Jose More.

Admitted to the United States

December 6, 1958
February 3 or 9, 1959
February 18, 1959
August 8, 1959
February 14, 1960
March 15, 1960

Readmitted to Cuba

January 30, 1959
February 15, 1959
March 5, 1959
January 22, 1960
February 24, 1960

Taxpayer was not in Cu a after March 15, 1960. He applied for permanent residence status in the United States at Montreal, Canada, on June 20, 1961, and became a United States citizen on July 18, 1966. (R. 27.)

The taxpayer filed no federal tax return for 1959. (R. 25.)
He filed returns for the calendar years 1960 through 1964.^{4/}

Due to the application of net operating losses and net operating loss carry forwards caused by Cuban expropriation losses, taxpayer had no taxable income for calendar years 1960 through 1963. (R. 29.) For calendar year 1964, taxpayer had taxable income in the amount of \$204,747.19. (Stip. par. 4, R. 8.) reported this taxable income on his 1964 return and utilized the income averaging provisions of the Code (Sections 1301-1305) to report a tax liability of \$67,232.83. (Stip. par. 6, R. 9.) Commissioner disallowed taxpayer's use of the income averaging provisions for the 1964 calendar year because taxpayer was a nonresident alien for a portion of 1960 which was deemed to be part of his "base period" and because, pursuant to the statute,

^{4/} Taxpayers filed their returns on a joint basis for the five relevant years; however, they amended their 1960 return to file for that year as married, filing separately. (Stip. par. 3, R. 8; Stip. Exs. 1A, 2B, 3C, 4D, 5E, 6F, 7G, 8H (R. 16-23).)

nonresident status during any part of the base period disqualifies the taxpayer from the benefits of income averaging. Taxpayer petitioned the Tax Court for a redetermination of liability and, after trial and briefing, that court upheld the Commissioner's determination. This appeal followed.

SUMMARY OF ARGUMENT

The question on appeal is whether the taxpayer is entitled to the income averaging benefits of Section 1301 et seq. of the 1954 Code despite the fact that he was a nonresident alien from January 1 to March 15, 1960. Section 1303(b) of the Code, which frames the issue herein, provides that an individual shall not be eligible for income averaging if he was a nonresident alien "at any time" during the four year income averaging "base" period--here 1960 through 1963. Nonresident aliens are not subject to taxation on income from foreign sources.

Taxpayer was a resident of the United States for the entire relevant period 1960 through 1964 except for the first two and a half months of 1960. Taxpayer attempts to escape the disqualification mandated by Section 1303(b) by excising that period from his base period, contending that he is entitled to use a short tax year for 1960 consisting of the period March 15 through

December 31, 1960. Although the statute contemplates by its language the use of a short tax year as part of the four year base period, it does not specify the conditions for use of a short tax year, leaving it to the Secretary to do so by regulation as authorized by Section 1305. In Treasury Regulations Section 1.1304-6, it is specified that short tax years can be used for purposes of the income averaging provisions only under the conditions described in Section 443(a)(1) and (a)(2) of the Code-- i.e., when taxpayer had had an authorized change of accounting period or when the taxpayer was not in existence for a part of what would otherwise have been his tax year. The instant taxpayer contends (1) that these Regulations are not binding upon him and (2) alternatively, that he qualifies thereunder since he was not in existence prior to March 15, 1960.

It is well established that duly promulgated Treasury Regulations are binding and have the force of law unless they are shown to be invalid in the sense that they are incompatible with the clear purport of the statute. Taxpayer has made no serious effort to show incompatibility between the provision of the Regulations and the thrust of the statute and, thus, this argument must fail.

Taxpayer's second alternative--that he was not "in existence" in the early part of 1960 when he was nonresident (see Section 443(a)(2))--is based upon the definition of a taxpayer contained in Section 7701(a)(14) of the Code as a person "subject to any internal revenue tax" and the contention

that he was not subject to any tax during the period in question because he received no reportable income during that period. But, taxpayer errs in his premise that he was not subject to taxation during the period in question. He confuses the fact that he received no taxable income for that period with the concept of being not subject to taxation. Any person who, in the event he receives a particular type, or types, of income during a given period, is required to report it and pay any tax due thereon is "subject" to United States taxes. Moreover, the terms "taxpayer" and "in existence" are not coterminous in scope and meaning in Section 443(a)(2), "taxpayer" being used there in a sense which makes it interchangeable with "person." While one not in existence can obviously not be a taxpayer, it does not follow that one who is not a taxpayer--i.e., not subject to taxes--cannot be in existence. Since the concern of Section 443(a)(2) is with "existence," even if the taxpayer had not been subject to internal revenue taxes in the period prior to March 15, 1960, the question would be left open whether he was "in existence" within the meaning of that section. Adoption of taxpayer's theory would make it possible for any nonresident alien to nullify the provision of the statute by using the short tax year method to exclude any periods of non-residency from his base period.

ARGUMENT

FOR PURPOSES OF SECTION 1303(b) OF THE INTERNAL REVENUE CODE ALL OF CALENDAR YEAR 1960, AND NOT MERELY THE PART FOLLOWING TAXPAYER'S ASSUMPTION OF RESIDENT ALIEN STATUS, CONSTITUTES PART OF TAXPAYER'S BASE PERIOD AND TAXPAYER IS THUS DISQUALIFIED FROM THE BENEFITS OF INCOME AVERAGING OF HIS TAXABLE INCOME BECAUSE OF HIS NON-RESIDENT ALIEN STATUS DURING THE FIRST PART OF 1960

One of the fundamental premises upon which the federal system of income taxation is founded is the annual accounting system. Internal Revenue Code of 1954, Sec. 411 (26 U.S.C.). As the Supreme Court stated in United States v. Consolidated Edison Co., 366 U.S. 380, 384 (1961):

It is settled that each "taxable year" must be treated as a separate unit, and all items of gross income and deduction must be reflected in terms of their posture at the close of such year.

To this annual income, the Code applies various rates of tax depending, among other factors, upon the level of taxable income reported for a given year. With a few exceptions the annual accounting concept renders one's taxable income of previous years and the taxes paid in those years irrelevant in determining one's taxes for the current year. Prior to 1964 this produced disparate results between or among taxpayers whose income over a period of years might in aggregate be equal. For example, using today's tax rates, if married taxpayer A had taxable income of \$20,000 per year for the last five years and married taxpayer B, had taxable income of \$0, \$0, \$10,000, \$10,000 and \$80,000 for the

same period, their total taxable income for the five years would be the same--\$100,000, but their tax payments for the same period would, because of the progressive rate schedule, be markedly different.^{5/}

In 1963, Congress in recognition of the tax inequities that were often visited upon taxpayers due to the timing of their receipts or deductions, enacted Sections 1301 through 1305 of the Code, commonly known as the income averaging provisions, which permit a qualifying taxpayer to compute his tax for a high income year by reference to the tax rate level which would have been obtained had his total income for a five year period been substantially level. However, Section 1303(b) of the Code, Appendix, infra, provides that an individual shall not be eligible for income averaging if such individual was a nonresident alien "at any time" during the computation year or during "the base period." The computation year is the one with respect to which the taxpayer elects the benefits of income averaging--here, 1964. The "base period" constitutes "the 4 taxable years immediately preceding the computation year." Sec. 1302(e)(1) and (e)(2)^{6/}, Appendix, infra. Taxpayer (see Br. 4) does not dispute

^{5/} For example, taxpayer A, with a steady income would have a yearly tax due of \$4,380, or \$21,900 total for the five years. Taxpayer B, on the other hand would be liable for taxes for the five years as follows: \$0, \$0, \$1,820, \$1,820 and \$33,340, or a total of \$36,980.

^{6/} Redesignated and amended as Section 1302(c)(1) and (c)(2) by Section 311(b), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487.

the finding made by the Tax Court (R. 28) that he was a non-resident alien for a portion of the 1960 taxable year. Therefore, if, as contended by the Commissioner and held by the Tax Court, the entire calendar year 1960 constitutes the earliest of the four taxable years immediately preceding 1964, there is no question (and we do not understand taxpayer to contest) that he is disqualified from income averaging for 1964 by the provision of Section 1303(b).

Taxpayer seeks to avoid this result by contending that calendar year 1960 did not constitute his taxable year but that, rather, his fourth taxable year immediately preceding 1964 consisted of a "short tax year" comprising only part of 1960-- i.e., the part during which he was a resident alien^{7/} and that he is thus not disqualified by the subject provision of Section 1303(b). The taxpayer's difficulty is that although Section 1304^{8/}(g) of the Code (26 U.S.C.) does contemplate the possibility of a short tax year constituting one of the base years, Section 1305, Appendix, infra, confers specific authority upon the Secretary of the Treasury, or his delegate, to prescribe

^{7/} Taxpayer seems to suggest that this was the period from March 15 through December 31, 1960. However, although the Tax Court held that taxpayer was not in Cuba after March 15, there is no finding that he was resident in the United States after that date or that he is properly classified as having been a resident alien from March 15 through the balance of the year.

^{8/} Redesignated as Section 1304(f) by Section 311(d), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487.

Regulations necessary to administer the income averaging provisions. Since the statute does not define what constitutes a short year for purposes of Section 1304(g), it was left to the Secretary to provide this definition by regulation. This was done in Treasury Regulations on Income Tax Section 1.1304-6, Appendix, infra, which adopts the tests of Section 443(a), Appendix, infra, as to what constitutes a short year. The taxpayer attempts to overcome this hurdle with two alternative arguments: (1) that this provision of the Regulations should not be followed and (2) that his situation comes within the regulatory provision in that (as provided in Section 1.1304-6(b) of the Regulations and Section 443(a)(2) of the statute) he was not "in existence" prior to assuming resident status on March 15, 1960^{9/}. We will demonstrate separately the lack of merit in each of these contentions. Preliminarily, however, we point out that what the taxpayer is attempting to do, in effect, is to write out of the statute the disqualification based on nonresident alien status. The Senate Committee Report (S. Rep. No. 830, 88th Cong., 2d Sess., p. 144 (1964-1 Cum. Bull. (Part 2) 505, 648) states:

^{9/} The second alternative was not raised by taxpayer in the Tax Court. (See Br. 13, fn. **.)

To be eligible for averaging, one of the principal concerns is that the individual's income must have been subject to tax by the United States throughout the entire base period as well as the computation year. No one is eligible for averaging who was a nonresident alien in any of the 4 base period years or in the computation year. (Emphasis supplied.)

See, also H. Rep. No. 749, 88th Cong., 1st Sess., p. A173 (1964-1 Cum. Bull. (Part 2) 125, 421). Given the above expression of Congressional intent, it seems quite irrelevant whether the taxpayer had a period of nonresidency at the beginning, in the middle, or at the end of the five-year span. Each is equally intended to be disqualifying. If there is merit to the instant taxpayer's theory, there seems no reason why, assuming he had been resident during the entire five-year period 1960 through 1964 except for, e.g., a three-month stretch from May 1 to July 31, 1962, he could not then excise that period and create two short-years--January through April, 1962 and August through December, 1962. In that event, the proscription on income averaging where the taxpayer was a nonresident alien during any part of the five-year period has been thoroughly nullified since it would be open to any taxpayer to eliminate from the five-year period to be taken into account any portion during which he was a nonresident alien. Simply stated, that is what the instant taxpayer is attempting to do.

A. The Regulations are valid and controlling

Although taxpayer makes it his second argument, we think that the question of the controlling effect of Section 1.1304-6

of the Regulations is the threshold question and we will deal with it first.

Taxpayer says simply (Br. 14) that the provisions of Section 1.1304-6 as to what constitutes a short year for purposes of the income averaging provisions "cannot be viewed as the exclusive basis for determining the meaning of the phrase 'short taxable year' as it is used in § 1304(f) of the income averaging provisions." Taxpayer does not say why this is so and offers no supporting authority. The short answer is that this provision of the Regulations is controlling (and the exclusive basis) unless taxpayer can show the Court that it is invalid because clearly contrary to the intent and purport of the statute. Commissioner v. South Texas Co., 333 U.S. 496, 501 (1948); United States v. Correll, 389 U.S. 299, 306-307 (1967). Moreover, the burden on taxpayer is even more demanding in that the Regulations here in question were promulgated under the express authority of the Congress in Section 1305 to fill in the gaps and definitions needed to administer the income averaging provisions. See 1 Mertens, Law of Federal Income Taxation (Rev.), Sect. 3.20, p. 42.

In attacking the applicability of the subject provision of the Regulations, taxpayer does not expressly contend that it is incompatible with the purpose or with the language of the statute. Rather, he asserts (Br. 14) that there are provisions of the Code other than Section 443 which provide an interpretation of "short taxable year" which "supply an equally rational

interpretation of that phrase." This, of course, assuming it to be true, is of no help to taxpayer. The authority to choose between two or more possible reasonable applications is precisely that which the Congress conferred on the Secretary in Section 1305. The Treasury having exercised that authority in the prescribed manner, the fact that this or that taxpayer finds another possible interpretation more pleasing (and beneficial to his tax interest) is wholly irrelevant.^{10/}

Moreover, even if the provision of the Regulations were not conclusive on the point, taxpayer can find little comfort (see Br. 16) in, e.g., Section 7701(a)(23) (26 U.S.C.). Conceding that "taxable year" means the period for which the return was made, the fact is that taxpayer filed a return for the entire calendar year 1960. (Stip. Exs. 1A (R. 16), 2B (R. 17).) And, if taxpayer is reading the language of Section 7701(a)(23) as meaning the period for which a return is required to be or, should have been, made, this, of course, is the very issue in dispute herein and taxpayer cannot bootstrap himself by assuming the correctness of his position.

Similarly, Section 6012 (26 U.S.C.) and the Regulations thereunder referred to by taxpayer (Br. 16-17) do not help, but undercut, taxpayer's position. Whatever inference may be drawn

^{10/} The trifling and dubious comparisons of language to which taxpayer points (Br. 15) are scarcely of sufficient force (even assuming they had some tendency to support taxpayer's view, which we doubt) to warrant setting aside a regulatory provision.

from the fact that a separate schedule must be attached to the return filed by a taxpayer who was a citizen or resident alien on the last day of the year, the language of the statute clearly refers to the entire calendar year in question as the "taxable year" of such a taxpayer. It specifies that a return must be filed "for the taxable year" and then that the separate schedule is to be filed to show the computation for "the part of the taxable year" (emphasis added) during which the taxpayer was a nonresident alien. Thus, even when the taxpayer is a nonresident alien for a part of the calendar year his taxable year includes the period of nonresidency.

B. Taxpayer does not satisfy the requirements of Section 443(a)(2) for purposes of establishing a "short taxable year" in 1960

In an alternative argument advanced for the first time in ^{11/} this Court, taxpayer contends that, even if the Regulations are controlling and limit his entitlement to a short 1960 taxable year to the conditions established in Section 443(a), he meets that requirement in that (taxpayer contends) he was not "in existence" prior to March 15, 1960, within the meaning of Section 443(a)(2). He reaches this conclusion in reliance upon Section 7701(a)(14) of the Code (26 U.S.C.) which defines a taxpayer as any person "subject to any internal revenue tax"

^{11/} Taxpayer not only failed to advance this argument in the Tax Court but affirmatively conceded that he did not satisfy the conditions of Section 443. (R. 31.) Nevertheless, we do not object to it being considered by this Court since the Tax Court did address itself (R. 33) to the question whether the taxpayer was "in existence" prior to his becoming a resident.

and on the assumption that, as a nonresident alien prior to March 15, 1960, he was not subject to any internal revenue tax. The short answer is that the taxpayer was subject to internal revenue taxes during the period January 1 through March 15, 1960. He fails to recognize the difference between receiving no reportable income for a given period (i.e., being liable for no taxes for that period) and being not subject to taxation. Many persons who are subject to the internal revenue taxes of the United States may, nevertheless, receive no reportable income during a particular period of time. For example, it is quite common for citizens of the United States, or resident aliens, to receive no income for a period of months within a given tax year because they are temporarily unemployed or because all income received during that period is, for one reason or another, tax exempt. Nevertheless, if they receive reportable income during the balance of the tax year, they must file a return and we can scarcely believe that the instant taxpayer would suggest that all such persons are required to file a return only for a short tax year consisting of the period during which they happened to have received income.

Being subject to United States taxation means simply that, if during the fiscal (i.e., taxable) year of a particular person, he receives income of a type and amount which is taxable by the United States, he must report it and pay the prescribed taxes thereon. The fact that a particular person is, because of his status (e.g., nonresident alien, exempt organization under

Section 501 (26 U.S.C.) etc.) subject to taxation on a more limited group of income items than other persons does not alter the fact that he is subject to taxation to the extent he receives items of income as to which he is not exempt. The instant taxpayer was, during the entirety of 1960, subject to taxation on any income received by him from the conduct of a trade or business in the United States, on capital gains received under certain circumstances, etc. See Sec. 871 of the Code (26 U.S.C.); United States v. Johansson, 447 F. 2d 702 (C.A. 5, 1971). We do not understand taxpayer to deny that, had he received income of these types during the part of 1960 prior to his assumption of residency in this country, he would have been subject to taxation on it. He was thus in no different situation than a United States citizen who happened to have been out of work, or for any other reason without income, between January 1 and March 15, 1960. Both would be subject to taxation during that period and both would be required to file a return for the full calendar year 1960, if that would otherwise have been the proper taxable period.

Moreover, we suggest that "in existence" is a highly improbable term for Congress to use as synonymous with "subject to internal revenue taxes"--this being the substance of taxpayer's theory. We submit that it is fairly obvious that what the Congress had in mind was (1) non-individual taxpayers such as corporations organized or terminated during a given period or (2) individuals who are born or die during such period. See, e.g., Treasury Regulations Sec. 1.6012-3(b)(1) which prescribe that, for an

individual who dies during the year, a return be filed for a short tax year ending with the date of his death.

Taxpayer's position further fails to take into account a cardinal principle of our federal tax system--i.e., annual accountability. See United States v. Consolidated Edison Co., supra, p. 384. That concept requires that the particular taxpayer's reporting or tax period be established as a first step so that it can be determined by reference thereto what types of income, and how much, are to be reported by him in connection with that period. Taxpayer's theory would put the cart before the horse, making the receipt of income, vel non, determinative of what the accounting period is to be.

As the Tax Court noted (R. 33), the courts have consistently held, in the case of aliens leaving the country, that their tax year remains the same as it would otherwise have been and that the situation does not justify use of a short tax year. In Simenon v. Commissioner, 44 T.C. 820 (1965), the Tax Court ruled that the fact that a taxpayer is a resident for a portion of a given year requires that he file a return for the entire year even if a portion of his income is not subject to United States law. In arriving at this decision the Tax Court stated (p. 832):

Section 441 of the Code provides that taxable income shall be computed on the basis of the taxpayer's "taxable year," which means his annual accounting period, either the calendar year or a fiscal year, and that the term "annual accounting period" means "the annual period on the basis of which the taxpayer regularly computes his income in keeping his books." Petitioner did not establish that prior

to 1955 he had not regularly computed and reported his income on the basis of a calendar year. Lacking evidence to the contrary, it is found and concluded that his regular accounting period was the calendar year. Van Der Elst v. Commissioner, 223 F. 2d 771, 773.

See also Klaas v. Commissioner, 36 T.C. 239, 242-243 (1961).

Taxpayer purports (Br. 10-13) to find support for his theory in Aguilar v. United States, 501 F. 2d 127 (C.A. 5, 1974) and Bunnel v. Commissioner, 50 T.C. 837 (1968). In Aguilar, the Fifth Circuit was deciding a question having nothing to do with the issue here at bar and which did not require resolution of the question here raised by taxpayer. The dispute there was with respect to whether it was necessary for the Commissioner to issue a notice of deficiency (thus giving the taxpayer access to the Tax Court). Although the instant taxpayer seeks to suggest (Br. 10) that Aguilar dealt in peculiar with the rights of a nonresident alien, the fact is that the question there had nothing to do with this factor and the decision would obviously have been the same whether the particular taxpayer was a nonresident alien, a resident alien or a United States citizen--as note the fact that in neither of the two cases cited by the Aguilar court as controlling its decision^{12/} is it indicated that the taxpayer was anything other than a United States citizen. We have no idea why the Fifth Circuit

^{12/} Clark v. Campbell, 501 F. 2d 108 (C.A. 5, 1974), cert. denied, 423 U.S. 1091 (1976); Willits v. Richardson, 497 F. 2d 240 (C.A. 5, 1974).

made the gratuitous comments quoted by taxpayer (Br. 10) but they had nothing to do with the basis of decision and were, at best, dicta. Moreover, they were erroneous dicta. The implication there that the nonresident alien was not required to file a return and thus was not a taxpayer because he did none of his business in the United States is at odds with the provision of Section 871 which makes certain types of income taxable to a nonresident alien--and requires filing of a return--whether or not that alien conducted any business in this country. Hence, we respectfully submit that this Court should not regard the dicta from Aguilar as a meaningful authority in support of taxpayer's position that he was not a taxpayer prior to March 15, 1960, and was thus entitled to file a short tax return for the period starting on that date.^{13/}

In Bunnel v. Commissioner, ^{14/}supra, the question pertinent here arose out of the fact that the notice of deficiency required by Section 6212 and 6213 (26 U.S.C.) had been sent to the shareholders of a Subchapter S corporation (Section 1371 et seq.

^{13/} Taxpayer is in any event wide of the mark in placing emphasis on the use of the term "taxpayer" in Section 443(a)(2), rather than the words "in existence." Where the question is whether a return should be filed for a normal tax year or a short tax year, it is obvious that the person in question is a taxpayer who must file a return for at least some part of the year or there would be no point in the provision. The prescription of Section 443(a)(2) could have been as well stated with the words "When the [person] is in existence * * *."

^{14/} The opinion in Bunnel was by the same judge (Tannenwald) who decided the instant case.

(26 U.S.C.)) rather than to the corporation. The shareholders contended that the information return required to be filed by such a corporation ^{15/} was expressly made subject to the statute of limitations on assessment and that the failure to send a timely deficiency notice to it barred assessment of the deficiency.

The Tax Court, noting that Section 1372(b)(1) (26 U.S.C.) provides that an electing Subchapter S corporation "shall not be subject to the taxes imposed by this chapter" (i.e., the provisions for normal taxes and surtaxes on income), held that no purpose could be served by providing the corporation with a notice of deficiency since it was required to pay only taxes (social security, etc.) as to which the Tax Court had no ^{16/} jurisdiction. Therefore, while acknowledging that a very literal application of the definition of taxpayer in Section 7701(a)(14) would cover the corporation into the concept of "taxpayer" required to be served with a deficiency notice, it went on to apply the rule that such literal applications should not be applied where it leads to absurd results (such as requiring that a deficiency notice be served on a corporation which has no need and no use for it). Consistent with this approach, it ruled in effect that the term "internal revenue

^{15/} The corporation is required to file an information return setting forth its income and deductions but the taxable income is deemed to be that of the shareholders who are required to pay the tax, regardless of whether or not the income is in fact distributed to them by the corporation in the year in question.

^{16/} It further noted that the fact that a Subchapter S corporation was itself required to pay taxes of this nature accounted for the provision making the statute of limitations applicable to the information return required to be filed by such corporations.

taxes" used in Section 7701(a)(14) should be read, for purposes of Sections 6212 and 6213, as referring only to taxes for which particular taxpayer claiming the right to be served with a notice of deficiency would be liable.

We find nothing in the entirely reasonable holding in Bunnel which helps the instant taxpayer. The Court did not hold that the corporation there was not a taxpayer in the general sense. Indeed, it necessarily recognized that it was, since it was liable for certain types of taxes. What it did hold was that both the corporation and the shareholders were taxpayers with respect to different types of taxes but that only a shareholder should be deemed "the taxpayer" who was accorded the right to receive a notice of deficiency by Sections 6212 and 6213, since only the shareholder could be benefited thereby. Applying the rationale of Bunnel to the instant taxpayer, it might be argued that he should not be deemed a taxpayer during the period January 1 to March 15, 1960, for purposes of income from sources outside the United States and not covered under Section 871. But it cannot relieve him of the character of "taxpayer" for purposes of the types of taxes for which nonresident aliens are liable (see Section 871) and since the latter types require filing of a tax return and determination of the proper tax year, the Bunnel rationale provides no basis for taxpayer's contention that he was not a taxpayer "in existence" until March 15, 1960.^{17/}

^{17/} Indeed, we suggest that the only aspect of the Bunnel opinion which is instructive here (p.841) is the reference to the admonition of Section 7701(a) that the definitions contained therein are not to be applied rigidly where, as taxpayer's application would do, they would produce an obviously improper result.

CONCLUSION

For the reasons stated above, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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MARCH, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 28th day of April, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 443. RETURNS FOR A PERIOD OF LESS THAN 12 MONTHS.

(a) Returns for Short Period.--A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

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(2) Taxpayer not in existence for entire taxable year.--When the taxpayer is in existence during only part of what would otherwise be his taxable year.

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SEC. 1301 [as amended by Sec. 232(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19]. LIMITATION ON TAX.

If an eligible individual has averagable income for the computation year, and if the amount of such income exceeds \$3,000, then the tax imposed by section 1 for the computation year which is attributable to averagable income shall be 5 times the increase in tax under such section which would result from adding 20 percent of such income to the sum of--

(1) 133 1/3 percent of average base period income, and

(2) the amount (in any) of the average base period capital gain net income.

SEC. 1302. DEFINITION OF AVERAGABLE INCOME; RELATED DEFINITIONS.

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(e) [as added by Sec. 232(a), Revenue Act of 1964, supra] Other Related Definitions.--For purposes of this part--

(1) Computation year.--The term "computation year" means the taxable year for which the taxpayer chooses the benefits of this part.

(2) Base period.--The term "base period" means the 4 taxable years immediately preceding the computation year.

(3) Base period year.--The term "base period year" means any of the 4 taxable years immediately preceding the computation year.

* * *

SEC. 1303. ELIGIBLE INDIVIDUALS.

* * *

(b) [as amended by Sec. 232(a), Revenue Act of 1964, supra] Nonresident Alien Individuals.--For purposes of this part, an individual shall not be an eligible individual for the computation year if, at any time during such year or the base period, such individual was a nonresident alien.

* * *

SEC. 1305 [as added by Sec. 1, Act of August 26, 1957, P.L. 85-165, 71 Stat. 413 and as amended by Sec. 232(a), Revenue Act of 1964, supra]. REGULATIONS.

The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this part.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.1304-6 Short taxable years.

* * *

(b) Taxpayer not in existence for entire taxable year. If an individual is required under section 443 (a)(2) and the regulations thereunder to make a return for a short period, such short period may be treated as a computation year or a base period year. The amount of such individual's taxable income (if such short period is a base period year) is computed as if such short period were a taxable year of 12 months ending on the last day of the short period.

* * *